

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN DEFENSE OF ANIMALS;
DREAMCATCHER WILD HORSE AND
BURRO SANCTUARY; BARBARA
CLARKE; CHAD HANSON;
LINDA HAY,

No. 2:10-cv-01852-MCE-DAD

Plaintiffs,

v.

MEMORANDUM AND ORDER

UNITED STATES DEPARTMENT OF
THE INTERIOR; BUREAU OF LAND
MANAGEMENT; KEN SALAZAR,
Secretary of the United States
Department of the Interior;
ROBERT ABBEY, Director of the
Bureau of Land Management; KEN
COLLUM, Acting Field Manager
of Eagle Lake Field Office,

Defendants.

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Plaintiffs in this action, which consist of an animal rights group along with a wild horse and burro sanctuary and other concerned individuals, filed this action on July 15, 2010, to halt a planned "gather," or round-up, of wild horses and burros scheduled to commence on August 9, 2010, at the Twin Peaks Herd Management Area ("HMA").

1 Plaintiffs argued that the planned gather ran counter to the
2 congressional mandate for preserving wild horses and burros as
3 set forth in Wild Free-Roaming Horses and Burros Act, 16 U.S.C.
4 § 1331, et seq. ("Act"). Plaintiffs also contended that the
5 provisions of the National Environmental Policy Act ("NEPA") had
6 been violated because the Environmental Assessment ("EA") for the
7 gather failed to adequately analyze a reasonable range of
8 alternatives, failed to ensure scientific integrity and
9 dissenting opinion, and consequently failed to take the requisite
10 "hard look" at the proposed action for NEPA purposes. Because of
11 the cumulative impacts occasioned by the gather and its
12 unprecedented scope, Plaintiffs asked that the Court require the
13 preparation of a comprehensive Environmental Impact Statement
14 ("EIS") before moving forward with the gather.

15 Plaintiffs initially moved for preliminary injunctive relief
16 on July 22, 2010 given the impending August 9, 2010, gather.
17 Following the August 5, 2010, hearing on the Motion, the Court
18 denied Plaintiffs request from the bench on grounds, inter alia,
19 that Plaintiffs were not likely to prevail on the merits. That
20 ruling was followed by a Memorandum and Order filed August 9,
21 2010. Plaintiffs immediately filed a notice of interlocutory
22 appeal. Plaintiffs' request for emergency injunctive relief was
23 denied by the Ninth Circuit, and the gather proceeded.
24 Plaintiffs' appeal was ultimately denied by the appeals panel on
25 August 15, 2011, on grounds that because the gather had already
26 occurred, the injunctive relief sought had become moot.

27 Defendants thereafter filed a motion to dismiss in this
28 court, requesting that the entire lawsuit be thrown out as moot.

1 Because Plaintiff's complaint raised issues that remained
2 justiciable, particularly since they could potentially resurface
3 in future gathers, the Court denied the motion to dismiss by
4 Memorandum and Order filed April 20, 2011. Both Plaintiffs, the
5 government and Defendant-Intervenor Safari Club International
6 ("Safari Club") have now filed motions for summary judgment. The
7 parties agreed at the time of oral argument on those motions that
8 the case should be resolved on summary judgment.

9 As set forth below, the Court will grant the summary
10 judgment requests made on behalf of the government and the Safari
11 Club and will deny Plaintiff's concurrent request for summary
12 judgment. Because the argument proffered by the parties closely
13 track the arguments already made in connection with the earlier
14 filed motion to dismiss, this Memorandum and Order closely
15 follows the Court's previous April 20, 2011 ruling.

16 17 **BACKGROUND** 18

19 The Twin Peaks HMA comprises some 789,852 acres of public
20 and private lands on either side of the border between California
21 and Nevada. AR 15443. Approximately 55 miles long from north to
22 south, and 35 miles wide, slightly more than half of the HMA is
23 located within Lassen County, California. The remainder is in
24 Washoe County, Nevada. The Bureau of Land Management ("BLM")
25 designated the Twin Peaks HMA as suitable for the long-term
26 maintenance of wild horses and burros in 1981. The Cal Neva
27 Management Framework Plan established a multiple use balance
28 between livestock, wild horses and wildlife in 1982.

1 The BLM's stewardship of public lands, including the oversight
2 and management of wildhorses and burros, is predicated on
3 principles of multiple use and sustained yield. AR 15443, citing
4 43 U.S.C. § 173; see also AR 15450.

5 This case arises from the Bureau's decision, in 2010, to
6 remove excess horses and burros from the Twin Peaks HMA. A 158-
7 page Final Environmental Assessment for the Twin Peaks Herd
8 Management Area Wild Horse and Burro Gather Plan ("Gather EA")
9 was released in May of 2010, and a Finding of No Significant
10 Impact ("FONSI") was thereafter issued in July of 2010. AR
11 15439, 15741, 15737. BLM's goal in proposing the Gather EA was
12 to restore a thriving ecological balance and to prevent further
13 degradation of habitat caused by an overpopulation of wild
14 horses. AR 15442. The EA represented the culmination of nearly
15 a year of study, as aided by a 30-day scoping period as well as a
16 30-day period for public comment followed by a public meetings
17 and a field tour. AR 15550, 15746-47, 15750-51. The BLM
18 received more than 2,000 comments during this process and
19 published in its decisions both a summary by subject matter as
20 well as responses in each category. AR 15746-47, 15750-83.

21 The population of wild horses and burros within the HMA has
22 increased sharply since the first aerial population inventory was
23 conducted in 1973. At that time, 835 horses and 104 burros were
24 recorded. By 1977, the population was estimated to be at
25 approximately 3,000 horses. Because wild horses have few natural
26 predators and are a long-lived species, and since documented foal
27 survival rates exceed 95 percent, their population levels rise
28 quickly.

1 Even though nine gathers within the Twin Peaks HMA have taken
2 place since 1998, the estimated horse population has nonetheless
3 almost doubled since 2004. During the same period, burro numbers
4 rose from 74 to more than 280 animals.

5 A direct count aerial population inventory taken in
6 September of 2008 revealed some 1,599 horses and 210 burros. At
7 the time the EA at issue in these proceedings was prepared in
8 July of 2010, the current population was estimated to be 2,303
9 horses and 282 burros, based on a twenty percent horse foal crop
10 per year and a sixteen percent burro foal yield. AR 15472. This
11 was close to 4.5 times more wild horses and 4 times more burros
12 than the low range of the appropriate management level. ("AML").
13 AR 15448. The AML range for the Twin Peaks area had previously
14 been determined as constituting between 448 and 758 wild horses,
15 and 72 and 116 burros, as established through prior agency
16 decision, including the applicable resource management plan.¹
17 See Court's August 9, 2010 previous Memorandum and Order denying
18 preliminary injunction, ECF No. 53: 13-15. AMLs are designed to
19 ensure a thriving natural ecological balance consistent with
20 multiple use objectives for the HMA. Specifically, with respect
21 to wild horses and burros, the AML is defined as the number of
22 animals within an HMA which achieves and maintains a thriving
23 natural ecological balance. AR 15445. The BLM strives to remove
24 animals from the HMA, or take other remediation measures as
25 necessary, when population numbers exceed the established AML.

26
27 ¹ The BLM last revised the applicable resource management
28 plan ("RMP") in 2008, after more than four years of public input
and analysis. See AR 15448, 3867-69.

1 Absent a gather of excess animals, the Bureau estimated that
2 in ten years, given similar growth predictions utilizing a median
3 rate of approximately 23 percent, the wild horse population would
4 exceed 6,000 to 8,000 head. AR 15532. Population modeling
5 indicated that figure could increase to as much as 19,264 head,
6 depending on what variables were used. AR 15523. According to
7 the BLM, such population increases would cause serious
8 degradation of the range's soils, vegetation, water sources,
9 riparian areas, cultural resources and wildlife habitat. AR
10 15532, 15536-37, 15540-42; 15545, 15547-48. Moreover, even aside
11 from the potential environmental degradation caused by too many
12 animals, the Bureau went on to predict that once the habitat
13 could no longer support such anticipated population growth, the
14 horses would likely "crash" and experience a "substantial death
15 loss." AR 15532, 15534.

16 Since the EA was prepared, an in preparation for the
17 anticipated gather of excess horses and burros to begin on
18 August 9, 2010, the BLM conducted another aerial population
19 inventory on July 26, 2010. That inventory yielded a count of
20 2,236 wild horses and 205 burros, numbers slightly less, but not
21 appreciably lower, than the projected figures, particularly with
22 respect to the horses.

23 Based on the above numbers, the EA estimated, "based on an
24 aerial direct count population inventory," that there were some
25 1,855 horses in excess of the AML lower limit in 2010, as well as
26 205 excess wild burros.

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1 Compounding the situation, according to the BLM, is the fact that
2 wild horses exceed the forage allocated to their use by 3 to 5
3 times, since they graze constantly throughout the year.
4 Livestock, on the other hand, which are moved from place to
5 place, average only some 59 percent for cattle and 32 percent for
6 sheep of their allocated usage. While range conditions (both
7 water sources and vegetation) still remain fairly good, the BLM
8 believes that decreasing the numbers of horses and burros is
9 essential to avoid unduly depleting available resources in the
10 long run, especially since their numbers increase so rapidly if
11 left unchecked.

12 In order to trim current horse and burro populations to
13 appropriate levels, the BLM proposed that an attempt be made to
14 gather the entire population of horses and burros within the HMA.
15 As indicated above, on July 8, 2010, after preparing its EA, a
16 FONSI was issued with respect to another gather of excess
17 animals. The present lawsuit was thereafter filed on July 15,
18 2010.

19 Since previous gathers have typically rounded up only 80 to
20 90 percent of the animals, depending on the numbers actually
21 retrieved, the EA estimated that about 180 horses will be
22 released after the gather, leaving a total of some 450 horses and
23 72 burros in the HMA post-gather. AR 15542. Those numbers are
24 consistent with the established AMLs.

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1 The released horses would have a sex ratio of 60:40 studs to
2 mares in order to help curb future population increases (AR
3 14457); in addition, some or all of the released mares (depending
4 on the capture rates) would receive fertility control treatments
5 (an immunocontraceptive known as Porcine Zona Pellucida, or PZP)
6 designed to reduce their fecundity over the following two-year
7 period. See AR 155457-58.

8 Before the gather was scheduled to commence, and after the
9 EA in this matter was issued, the BLM conducted another aerial
10 population inventory to get a more exact count closer to the
11 start of the gather. That second inventory, completed on
12 July 26, 2010, showed a total of 2236 excess horses and 205
13 burros.

14 The gather took place in August and September of 2010 using
15 the helicopter drive method of capture. Veterans were on site
16 during the gather to examine animals and to make recommendations
17 to BLM regarding the care and humane treatment of the animals.
18 See AR 15460. After capture, BLM transported the wild horses to
19 short-term holding facilities, and from there they were made
20 available for adoption or sale to qualified individuals, or
21 placed in long-term pastures. Despite dire warnings, mortality
22 rates as a result of the capture were much lower than expected.

23 Plaintiffs object to the proposed gather as a direct
24 contravention of the Act. They claim that the EA does not
25 properly identify and categorize excess animals prior to capture.
26 They further contend that the BLM has not adequately shown that
27 HMA resources are being overtaxed by the current population of
28 horses to the extent that there are indeed excess animals.

1 In addition, Plaintiffs allege that the EA does not properly
2 analyze the combined effect of so many animals being gathered,
3 along with the impact that widespread contraception will have on
4 the animals and their social characteristics. By failing to
5 adequately address those issues, Plaintiffs claim that the EA
6 runs afoul of NEPA's mandate that a "hard look" be taken prior to
7 any significant environmental action. The government and the
8 Safari Club, on the other hand, argue that the EA was adequate
9 and that no violations of either the Act or NEPA have been
10 established.

11 12 **PROCEDURAL FRAMEWORK**

13
14 Congress enacted NEPA in 1969 to protect the environment by
15 requiring certain procedural safeguards before an agency takes
16 action affecting the environment. The NEPA process is designed
17 to "ensure that the agency ... will have detailed information
18 concerning significant environmental impacts; it also guarantees
19 that the relevant information will be made available to the
20 larger [public] audience." Blue Mountains Biodiversity
21 Project v. Blackwood, 171 F.3d 1208, 121 (9th Cir. 1998). The
22 purpose of NEPA is to "ensure a process, not to ensure any
23 result." Id. "NEPA emphasizes the importance of coherent and
24 comprehensive up-front environmental analysis to ensure informed
25 decision-making to the end that the agency will not act on
26 incomplete information, only to regret its decision after is it
27 too late to correct." Center for Biological Diversity v. U.S.
28 Forest Serv., 349 F.3d 1157, 1166 (9th Cir. 2003).

1 Complete analysis under NEPA also assures that the public has
2 sufficient information to challenge the agency's decision.
3 Robertson v. Methow Valley Citizens, 490 U.S. 332, 349 (1989);
4 Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1151 (9th Cir.
5 1998).

6 NEPA requires that all federal agencies, including the
7 Forest Service, prepare a "detailed statement" that discusses the
8 environmental ramifications, and alternatives, to all "major
9 Federal Actions significantly affecting the quality of the human
10 environment." 42 U.S.C. § 4332(2)(c). An agency must take a
11 "hard look" at the consequences, environmental impacts, and
12 adverse environmental effects of a proposed action within an
13 environmental impact statement ("EIS"), when required. Kleppe v.
14 Sierra Club, 427 U.S. 390, 410, n.21 (1976). To determine
15 whether an EIS is required, an agency may first prepare an
16 environmental assessment ("EA"). The objective of an EA is to
17 "[b]riefly provide sufficient evidence and analysis to
18 determining whether to prepare" an EIS. 40 C.F.R.
19 § 1508.9(a)(1). If the EA indicates that the federal action may
20 significantly affect the quality of the human environment, the
21 agency must prepare an EIS. 40 C.F.R. § 1501.4; 42 U.S.C.
22 § 4332(2)(C).

23 In the event an agency determines that an EIS is not
24 required, it must, as the BLM did here, issue a FONSI detailing
25 why the action "will not have a significant effect on the human
26 environment." 40 C.F.R. § 1508.13. As is customary, the FONSI
27 in this case is contained within the project EA.

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1 The EA must support the agency's position that a FONSI is
2 indicated. Blue Mountains, 161 F.3d at 1214.

3 NEPA does not mandate that an EIS be based on a particular
4 scientific methodology, nor does it require a reviewing court to
5 weigh conflicting scientific data. Friends of Endangered
6 Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985).

7 An agency must be permitted discretion in relying on the
8 reasonable opinions of its own qualified experts, even if the
9 court might find contrary views more persuasive. See, e.g.,
10 Kleppe, 427 U.S. at 420, n. 21. NEPA does not allow an agency to
11 rely on the conclusions and opinions of its staff, however,
12 without providing both supporting analysis and data. Idaho
13 Sporting Cong., 137 F.3d at 1150. Credible scientific evidence
14 that contraindicates a proposed action must be evaluated and
15 disclosed. 40 C.F.R. § 1502.9(b). If an EA or EIS adequately
16 discloses effects, NEPA's goal is satisfied. Inland Empire Pub.
17 Lands Council v. U.S. Forest Serv., 88 F.3d 754, 758 (9th Cir.
18 1996) (emphasis in original).

19 In addition to arguing that the Forest Service violated NEPA
20 in this case, Plaintiffs also contend that the gather violated
21 the Wild Free-Roaming Horses and Burro Act, 16 U.S.C. § 1331,
22 et seq. The Act, as discussed in more detail below, was enacted
23 to designate and maintain specific ranges on public lands as
24 sanctuaries for the horses' protection and preservation. Id. at
25 § 1333(a).

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1 Because neither NEPA nor the Act contains provisions
2 allowing a private right of action (see Lujan v. National
3 Wildlife Federation, 497 U.S. 871, 882 (1990) and Ecology Center
4 Inc. v. United States, 192 F.3d 922, 924 (9th Cir. 1999) for this
5 proposition under NEPA and NFMA, respectively), a party can
6 obtain judicial review of alleged violations of NEPA only under
7 the waiver of sovereign immunity contained within the
8 Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Earth
9 Island Institute v. U.S. Forest Serv., 351 F.3d 1291, 1300
10 (9th Cir. 2005).

11 Under the APA, the court must determine whether, based on a
12 review of the agency's administrative record, agency action was
13 "arbitrary and capricious," outside the scope of the agency's
14 statutory authority, or otherwise not in accordance with the law.
15 Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356
16 (9th Cir. 1994). Review under the APA is "searching and
17 careful." Ocean Advocates, 361 F.3d at 1118. However, the court
18 may not substitute its own judgment for that of the agency. Id.
19 (citing Citizens to Preserve Overton Park, Inc. v. Volpe,
20 401 U.S. 402 (1971), overruled on other grounds by Califano v.
21 Sanders, 430 U.S. 99 (1977)).

22 In reviewing an agency's actions, then, the standard to be
23 employed is decidedly deferential to the agency's expertise.
24 Salmon River, 32 F.3d at 1356. Although the scope of review for
25 agency action is accordingly limited, such action is not
26 unimpeachable. The reviewing court must determine whether there
27 is a rational connection between the facts and resulting judgment
28 so as to support the agency's determination.

1 Baltimore Gas and Elec. v. NRDC, 462 U.S. 87, 105-06 (1983),
2 citing Bowman Trans. Inc. v. Arkansas-Best Freight Sys. Inc.,
3 419 U.S. 281, 285-86 (1974). An agency's review is arbitrary and
4 capricious if it fails to consider important aspects of the
5 issues before it, if it supports its decisions with explanations
6 contrary to the evidence, or if its decision is either inherently
7 implausible or contrary to governing law. The Lands Council v.
8 Powell, 395 F.3d 1019, 1026 (9th Cir. 2005).

9
10 **STANDARD**

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12 Summary judgment is an appropriate procedure in reviewing
13 agency decisions under the dictates of the APA. See, e.g.,
14 Northwest Motorcycle Assn. v. U.S. Dept. Of Agric., 18 F.3d 1468,
15 1471-72 (9th Cir. 1994). Under Federal Rule of Civil Procedure
16 56, summary judgment may accordingly be had where, viewing the
17 evidence and the inferences arising therefrom in favor of the
18 nonmovant, there are no genuine issues of material fact in
19 dispute." Id. at 1472. In cases involving agency action,
20 however, the court's task "is not to resolve contested facts
21 questions which may exist in the underlying administrative
22 record," but rather to determine whether the agency decision was
23 arbitrary and capricious as defined by the APA and discussed
24 above. Gilbert Equipment Co., Inc. v. Higgins, 709 F. Supp.
25 1071, 1077 (S.D. Ala. 1989); aff'd, Gilbert Equipment Co. Inc. v.
26 Higgins, 894 F.2d 412 (11th Cir. 1990); see also Occidental Eng'g
27 Co. v. INS, 753 F.2d 766, 769 (9th Cir. 1985).

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1 Consequently, in reviewing an agency decision, the court must be
2 "searching and careful" in ensuring that the agency has taken a
3 "hard look" at the environmental consequences of its proposed
4 action. Ocean Advocates v. U.S. Army Corps of Engineers,
5 402 F.3d 846, 858-59 (9th Cir. 2005); Or. Natural Res.
6 Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997).

7 Because neither NEPA or the Wild Horse Act contain an
8 internal standard of review, both statutory provisions and
9 applicable case law confirm that the APA's "arbitrary and
10 capricious" standard applies. See 5 U.S.C. § 706(2)(A);
11 Am. Horse Prot. Ass'n v. Frizzell, 403 F. Supp. 1206, 1217
12 (D. Nev. 1975).

14 ANALYSIS

16 A. Violations of the Act

18 In enacting the Wild Free-Roaming Horses and Burros Act
19 ("Act") in 1971, Congress mandated that wild horses, as "living
20 symbols of the historic and pioneer spirit of the West," were to
21 be "protected from capture, branding, harassment or death," and
22 as such were to be considered an "integral part" of public lands
23 in areas where they were presently found. 16 U.S.C. § 1331. The
24 BLM, as the designate of the Secretary of Interior, is directed
25 to accomplish this by maintaining "specific ranges on public
26 lands as sanctuaries for their protection and preservation." Id.
27 at § 1333(a).

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1 Within only a few years of the Act's passage, however,
2 action became necessary "to prevent a successful program from
3 exceeding its goals and causing animal habitat destruction."
4 American Horse Prot. Ass'n v. Watt, 694 F.2d 1310, 1316 (D.C. Cir
5 1982) (quoting H.R. Rep No. 95-1122, at 23 (1978j)); see also
6 Blake v. Babbitt, 837 F. Supp. 458, 459 (D.D.C. 1993) ("[e]xcess
7 numbers of horses and burros pose a threat to wildlife,
8 livestock, the improvement of range conditions, and ultimately
9 [the horses themselves]") (citation omitted). Accordingly, in
10 1978, Congress amended the Act to provide BLM with greater
11 authority and discretion to manage and remove excess horses from
12 the rangeland. Id. Excess animals are defined as animals "which
13 must be removed from an area in order to preserve and maintain a
14 thriving natural ecological balance and multiple-use relationship
15 in that area" as well as horses that have been removed from an
16 area pursuant to applicable law. 16 U.S.C. § 1333(b)(2).

17 To this end, the 1978 Amendments require that the BLM
18 "maintain a current inventory of the animals". Id. at
19 § 1333(b). As Congress explained,

20 "The purpose of such inventory shall be to: make
21 determinations as to whether and where an
22 overpopulation exists and whether action should be
23 taken to remove excess animals; **determine appropriate
24 management levels of free-roaming horses and burros on
25 these areas of the public lands; and determine whether
26 appropriate management levels should be achieved by the
27 removal or destruction of excess animals,** or other
28 options (such as sterilization, or natural controls on
population)."

26 Id. (emphasis added).

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1 Although "all management activities shall be at the minimal
2 feasible level," the Act goes on to unequivocally provide that if
3 the current population inventory for an HMA reveals that
4 overpopulation exists, and if the BLM determines that "action is
5 necessary to remove excess animals," it "shall immediately remove
6 excess animals from the range so as to achieve appropriate
7 management levels." Id. at § 1333(b)(2).

8 In its Watt decision, the District of Columbia Circuit
9 recognizes the importance of permitting the BLM to quickly act in
10 order to address overpopulation issues, based on whatever
11 information to that effect becomes available:

12 "The most important 1978 amendment, for our purposes,
13 is section 1333(b)(2). That section addresses in
14 detail the information upon which BLM may rest its
15 determination that a horse overpopulation exists in a
16 particular area. The Agency is exhorted to consider
17 (i) the inventory of federal public land, (ii) land use
18 plans, (iii) information from environmental impact
19 statements, [and] (iv) the inventory of wild horses,
20 But the Agency is explicitly authorized to proceed with
21 the removal of horses "in the absence of the
22 information contained in (i-iv)." Clauses (i-iv) are
23 therefore precatory; in the final analysis, the law
24 directs that horses "shall be removed "immediately"
25 once the Secretary determines, **on the basis of whatever
26 information he has at the time of his decision**, that an
27 overpopulation exists. The statute thus clearly
28 conveys Congress's view that BLM's findings of wild
horse overpopulations should not be overturned quickly
on the ground that they are predicated on insufficient
information."

23 Watt, 694 F.2d at 1318 (emphasis in original).

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1 In removing excess animals, the Act proceeds to prescribe an
2 order in which removal of the animals should be addressed,
3 starting with old, sick or lame animals (which should be
4 destroyed in the most humane manner possible), then proceeding to
5 adoptable horses and burros which can be removed for "private
6 maintenance and care." Id. at § 1333(b) (2) (A-B). Although the
7 terms of the Act actually provide that excess animals for which
8 an adoption demand does not exist should be "destroyed in the
9 most humane and cost efficient manner possible," in fact Congress
10 has never appropriated funds for extermination, as opposed to
11 ongoing maintenance, of excess horses even if not adopted.

12 Plaintiffs initially argue that BLM's proposed gather
13 violates the Act because the animals are not removed according to
14 the priority established by § 1333(b). By rounding up all horses
15 and burros, according to Plaintiffs, BLM ignores the statutory
16 mandate that old, sick and lame animals be eliminated first
17 before determining if the number of remaining healthy animals
18 exceeds viable limits. A careful reading of the Act, however,
19 indicates only that "[t]he Secretary **shall order** old, sick, and
20 lame animals to be destroyed in the most humane manner possible.
21 16 U.S.C. § 133(b) (2) (A) (emphasis added). The operative verb
22 used is "order," not "destroy," with the directive to destroy
23 preceding any action that actually effectuates that directive.
24 The Gather Plan complies with the statutory framework by ordering
25 that old, sick or lame horses be destroyed after they are
26 determined to be in that condition after being removed from the
27 range.

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1 AR 15526, 15556 (following roundup, inspectors are to "determine
2 if animals must be euthanized and provide for the destruction of
3 such animals").² The Court agrees with the government that making
4 a determination with respect to the health of the animals on the
5 range is impracticable. While Plaintiffs argue that the
6 selection process in that regard could be accomplished by simply
7 using a pair of binoculars, making a definitive health assessment
8 absent close-up examination would appear all but impossible.
9 See, e.g., In Defense of Animals v. Salazar, 675 F. Supp. 2d 89,
10 97-98 (D.D.C. 2009). Moreover, euthanizing animals on the range
11 on the basis of only cursory inspection would ignore the active
12 use of the word "order" in the statute by calling for actual
13 destruction before any gather is even attempted.³

14 It should also be emphasized that an agency like BLM has
15 considerable discretion on how to carry out the directives of the
16 Act in any event.

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20 ² The Court rejects Plaintiffs' reliance on a piece of
21 legislative history that omits the word "order" as an attempt to
22 inappropriately rewrite the statutory language based on
23 legislative history that offers no definitive interpretive
24 guidance and amounts to little more than speculation. See
25 Howell-Robinson v. Albert, 384 B.R. 19, 24 (D.D.C. 2008).

26 ³ At the very least, the statutory use of the word "order"
27 as the operative verb makes it ambiguous whether the Bureau has
28 to destroy infirm horses before gathering them for other
disposition, and given that ambiguity the Bureau's interpretation
is entitled to so-called Chevron deference. Chevron v. N.R.D.C.,
467 U.S. 837, 843 (1984) ("[I]f the statute is silent or
ambiguous with respect to the specific issue, the question for
the court is whether the agency's answer is based on a
permissible construction of the statute.") Because the Court
concludes that the Bureau's reading of the statute is a
reasonable one it will accordingly defer to that interpretation.

1 Watt, 694 F. 2d at 1318; Am. Horse Prot. Ass'n v. Frizzell,
2 403 F. Supp. 1206, 1217 (D. Nev. 1975) (noting that BLM must be
3 afforded a "high degree of discretionary authority" in managing
4 herds). This discretion extends to BLM officials being allowed
5 to develop their own methodology for computing the "appropriate
6 management levels" ("AMLs") for the wild horse and burro
7 populations they are entrusted to protect. Fund for Animals v.
8 BLM, 460 F.3d 13, 15 (D.C. Cir. 2006). Given that discretion,
9 culling disabled animals from a more comprehensively captured
10 group of horses and burros is a method falling within the BLM's
11 discretion. While Plaintiffs urge that this vetting process
12 should occur on the range, as indicated above from a pragmatic
13 viewpoint it is difficult to see how effective selection could
14 occur absent some capture process. In its Defense of Animals v.
15 Salazar opinion, the District of Columbia Court of Appeals
16 rejected an argument similar to Plaintiffs', stating as follows:

17 "The plaintiffs' interpretation of the Wild Horse Act
18 is also unpersuasive as a matter of logic. Under the
19 plaintiff's reading, no healthy horse may be captured
20 before all old and infirm horses are destroyed. This
21 interpretation creates an impossible Catch-22 for the
22 agency: To evaluate the age and health of a horse, a
23 veterinarian must presumably be close to it for a
24 significant period of time. A wild horse is unlikely
25 to submit to such an inspection voluntarily; it would
26 have to be restrained or, more likely, confined- in
27 other words, captured. But if, as the plaintiffs
28 contend, the Bureau cannot capture a healthy horse
before euthanizing all unhealthy ones, and cannot
determine whether a horse is healthy or unhealthy
without capturing it, the agency cannot begin the
removal process, despite its statutory mandate to do
so. A statute should not be construed to produce
absurd results. (citation omitted). As a result, the
Wild Horse Act cannot logically be read to forbid the
capture of healthy horses prior to the euthanization of
unhealthy ones."

28 ///

1 In Defense of Animals v. Salazar, 675 F. Supp. 2d 89, 97-98
2 (D.D.C. 2009). Importantly, too, the Salazar case goes on to
3 find that rounding up the vast majority of a herd for sorting
4 does not "remove" all horses simultaneously from the range, since
5 some of the horses are ultimately returned to the wild. Id. at
6 97. Consequently, contrary to Plaintiffs' argument, "removal"
7 does not occur before a determination is made of what horses are
8 in fact "excess." Consequently, the Act's mandate is not
9 contravened.

10 While Plaintiffs rely heavily on the decision in Colorado
11 Wild Horse and Burro Coalition v. Salazar, 639 F. Supp. 2d 87
12 (D.D.C. 2009), that case is inapposite since it involved removal
13 of all wild horses in the West Douglas Herd Area in Colorado, and
14 because the BLM in that case had not made an excess determination
15 due to an overpopulation of horses. Here, on the other hand, the
16 BLM made a specific determination of just how many animals in the
17 Twin Rivers HMA were excess, based upon established "appropriate
18 management levels" ("AMLs") and other considerations in promoting
19 multiple uses of the federal lands in question.

20 With respect to what constitutes an appropriate AML, as
21 already indicated BLM officials are also afforded significant
22 discretion with respect to the wild horse and burro populations
23 they manage. See 16 U.S.C. § 1333(b). According to the BLM, the
24 AMLs in question here have been developed over the course of many
25 years. Moreover, and in any event, the BLM has discretion in
26 determining whether an excess population in fact exists, since
27 the Secretary can make that determination "on the basis of
28 whatever information he has at the time of his decision."

1 Am. Horse Prot. Ass'n v. Watt, 694 F.2d 1310, 1318, (D.C. Cir.
2 1982). The Bureau's determinations in that regard are entitled
3 to deference.

4 Although Plaintiffs contend that population levels under the
5 Act should be determined solely with reference to a "thriving
6 natural ecological balance" ("TNEB"),⁴ that argument appears
7 misplaced since the statute, as stated above, specifically
8 equates excess animals with AML levels. See 16 U.S.C.
9 § 1333(b)(2) (if overpopulation exists, the BLM "must immediately
10 remove excess animals from the range so as to achieve appropriate
11 management levels.").

12 AMLs are determined through revisions to the applicable
13 Resource Management Plan, or RMP. As the Gather EA notes, AMLs
14 are established in order to ensure both a thriving natural
15 ecological balance and a multiple use relationship in the HMA.
16 AR 15448. The BLM works to achieve AML guidelines on the range
17 in order to achieve a TNEB. AML is a vehicle used to move
18 towards a TNEB, and a trigger by which the BLM is alerted to
19 address population imbalance. Despite Plaintiffs' argument to
20 the contrary, TNEB represents an overall objective rather than
21 the means to accomplish it.

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26 ⁴ Plaintiffs rely on a 1978 amendment to the act which
27 defined "excess" horses as applying only to animals that "must be
28 removed from an area in order to preserve and maintain a thriving
natural ecological balance. 16 U.S.C. § 1332(f). The argument
appears to be circular, however, since TNEB is otherwise linked
to AML determinations.

1 That means, in the form of AML (as well as other factors the BLM
2 has the discretion to consider in determining overpopulation) has
3 already been determined and, as indicated above, no challenge to
4 the operative RMP and its AML determination is presently being
5 made.

6 Here, as discussed above, the wild horse population in the
7 Twin Peaks HMA well exceeded the high end of the AML, therefore
8 compromising the preservation and maintenance of a thriving
9 natural ecological balance in the preserve. See, e.g., AR 15442
10 (excess determination); AR 15442-15443 (noting insufficient
11 forage to sustain growing herd, impaired riparian and wetland
12 habitats, and impaired cultural resource cites); see also 15494-
13 15502 (discussing condition of riparian and wetland sites).
14 These determinations suffice in meeting the requirements of the
15 Act for determining that an excess population existed.

16 While Plaintiffs claim that horse and burro populations
17 should be given priority within the HMA, and that a greater share
18 of available resources (and presumably different AMLs) should be
19 allocated to them as opposed to cattle or other livestock, that
20 argument fails. First, to the extent that Plaintiffs propose
21 that the multi-use parameters for the HMA be changed, such a
22 change cannot be made within the confines of this action.
23 Rangeland stewardship is established through periodically
24 prepared resource management plans. See 43 U.S.C. § 1712;
25 43 C.F.R. Part 1600. The resource management plan applicable to
26 the Twin Rivers HMA was last revised in 2008, after more than
27 four years of public input and analysis.

28 ///

1 Any challenge to how range use is allocated must be made
2 administratively through the Federal Land Policy and Management
3 Act, 43 U.S.C. § 1701, et seq., and not through the Wild Free-
4 Roaming Horses and Burros Act. Allowing Plaintiff to litigate
5 the propriety of AMLs in this case outside the RMP process (as
6 they ostensibly attempt to do since no formal RMP challenge is
7 present here) would amount to an end-run around the proper
8 procedures for effectuating revisions to the applicable RMP.

9 Plaintiffs' argument that the HMA must be managed
10 "principally" for wild horse and burro use is also unpersuasive.
11 The Act is a land and resource management statute which requires
12 the BLM to "manage wild free-roaming horses and burros as
13 **components** of the public lands. 16 U.S.C. § 1333 (a) (emphasis
14 added). As enacted in 1971, the Act states only that ranges
15 should be "devoted principally but not necessarily exclusively to
16 horse and burro welfare in keeping with the multiple-use
17 management concept for the public lands." Id. at § 1333(c).
18 Although even this language does not mandate that only horse and
19 burro interests be considered, in 1978 Congress amended the act
20 to make it clear that BLM must strive for a balance that meets
21 the needs of all range users. As the D.C. Circuit explained,

22 "The main thrust of the 1978 amendments is to cut back
23 on the protection the Act affords wild horses, and to
24 reemphasize other uses of the natural resources wild
25 horses consume. The amendments introduce a definition
26 of "excess" horses: horses are in "excess" if they
27 "must be removed from an area in order to preserve and
28 maintain a thriving natural ecological balance and
multiple-use relationship in that area."

27 ///

28 ///

1 Am. Horse Prot. Ass'n Inc. v. Watt, 694 F.2d 1310, 1316 (D.C.
2 Cir. 1982) (citing 16 U.S.C. § 1332(f); see also Blake v.
3 Babbitt, 837 F. Supp. 458, 459 (D.D.C. 1993) ("[t]he amendments
4 make it clear the importance of management of the public range
5 for multiple uses, rather than emphasizing wild horse needs.")

6 The legislative history underlying the 1978 amendments
7 further illuminates Congress' intent:

8 "The goal of wild horse and burro management, as with
9 all range management programs, should be to maintain a
10 thriving ecological balance between wild horse and
11 burro populations, wildlife, livestock and vegetation,
and to protect the range from the deterioration
associated with overpopulation of wild horses and
burros."

12 Conference Report 95-1737, October 6, 1978 to accompany H.R.
13 10587, Public Rangelands Improvement Act of 1978. The Act should
14 consequently not be viewed as requiring that the BLM increase the
15 numbers of horses, or give wild horses priority over other users.
16 See Fallini v. Hodel, 725 F. Supp. 1113, 1118 (D. Nev. 1989)
17 (holding that the Act does not give horses higher status than
18 cattle on public lands). Instead, the focus of the Act is
19 rightly viewed as protecting wild horse herds as one component of
20 multiple species, and many users, sharing a common environment.

21 Plaintiffs also point to the Act's mandate that the BLM's
22 management of horses and burros be at a "minimal feasible level"
23 in arguing that the gather proposed here be enjoined. That
24 language, however, taken from § 1333(a), must be read in
25 conjunction with the equally clear directive that the Bureau
26 adopt a multiple-use management program, as set forth in
27 § 1332(c).

28 ///

1 As already noted above, horse populations in the HMA have
2 increased dramatically in recent years, and has approximately
3 doubled since 2004, despite numerous gathers. Left unchecked, it
4 appears the horse population could increase as much as 25 percent
5 annually.⁵ The BLM has already established that current
6 populations within the HMA exceed appropriate management levels
7 by more than five fold at the low range and by more than three
8 times at the high end of the spectrum. Given the clear statutory
9 mandate that "excess" horses be removed, the proposed gather does
10 not run afoul of the requirement that only "minimal" management
11 be employed. Moreover, given the burgeoning population, efforts
12 to slow reproduction (and the need to remove excess horses in the
13 future) through immunocontraceptives administered to released
14 mares, and through a skewed sex ratio of mares to stallions, is
15 also within the Act's purview given the circumstances of this
16 case.

17 Plaintiffs claim that removal of horses from the range,
18 particularly when combined with immunocontraceptive use and
19 unnatural sex skewing, is hardly management at the requisite
20 "minimum feasible level." Plaintiffs fail to appreciate,
21 however, that such treatments are specifically designed to slow
22 the growth rate and consequently decrease the need to remove
23 horses and burros from the range in the future.

25 ⁵ The EA estimates that populations are likely to increase
26 at between 23 and 25 percent a year. AR 15532. This means, as
27 the EA also points out, that wild horse population in the Twin
28 Peaks HMA, absent any gather and removal, would exceed 6,000 to
8,000 head within ten years, based on application population
increase estimates. This is significantly in excess of the AML
range for the horse population, at between 448 and 758.

1 In that sense, the BLM's actions are clearly designed to minimize
2 intervention in the long run.

3 Plaintiffs fare no better in arguing that the planned
4 storage and transport of wild horses to BLM long-term holding
5 facilities is illegal under the Act. While 16 U.S.C. § 1339 does
6 prohibit BLM from relocating wild horses and burros "to areas of
7 the public lands where they do not presently exist," the Act is
8 silent with respect to private lands. Since the BLM has been
9 barred by an appropriations statute from euthanizing health
10 excess horses (see AR 15529), relocation to private facilities is
11 necessary given the Act's mandate that excess horses be removed.
12 Significantly, as the government points out, Congress has
13 repeatedly provided funding to BLM for the operation of
14 facilities to house excess animals on private lands.⁶ By making
15 those appropriations, Congress has expressly acknowledged and
16 approved the Bureau's use of private facilities for the long-term
17 holding of excess horses.⁷

19 ⁶ Since Congress prohibited the destruction of health excess
20 horses, while retaining the statutory mandate to immediately
21 remove excess horses from the range if necessary to achieve a
22 thriving natural ecological balance, it created a "gap" for the
23 agency to fill pursuant to an express or implied delegation of
24 authority to the agency. Action given that gap is entitled to
25 so-called Chevron deference. Railway Labor Execs' Ass'n v. Nat'l
26 Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994 (en banc))
27 (quoting Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S.
28 837, 843-44 (1984)).

⁷ According to the Gather EA, these private facilities
consist of long-term holding grassland pastures in Oklahoma,
Kansas, and South Dakota "large enough to allow free-roaming
behavior and with the forage, water, and shelter necessary to
sustain [the animals] in good condition." AR 15528-29.
Interestingly, while Plaintiffs argue that relocation to holding
facilities forever alters the animals' wild and free-roaming

(continued...)

1 In 1990, for example, the Appropriations Committee stated that it
2 "continues to support the use of private sanctuaries as a method
3 of removing unadopted wild horses and burros," and directs BLM to
4 "continue to investigate private sanctuary proposals that are
5 found to be humane and cost effective." S. Rep. No. 534, 101st
6 Cong., 2nd Sess., 6, 1990 WL 201783 (1990).⁸

7 In sum, for all the above reasons, the Court finds that the
8 BLM's conduct of the 2010 Twin Peaks Gather did not run afoul of
9 the provisions of Wild Free-Roaming Horses and Burros Act, and
10 that the government and the Safari Club are accordingly entitled
11 to judgment as a matter of law as to Plaintiffs' allegations that
12 the 2010 Gather violated the Act.

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19 ⁷(...continued)

20 behavior, transfer to the private facilities enumerated above
21 would appear to be far more consistent with that behavior than
22 the other options for disposing of excess horses and burros
contemplated by the Act; namely, adoption, euthanasia or
commercial sale.

23 ⁸ The Court specifically rejects Plaintiffs' argument that
24 the holding facilities where the excess animals are housed, while
privately owned, are nonetheless "administered" by BLM and should
25 accordingly qualify as public lands upon which the animals did
not previously exist (the use of which is barred under the Act).
26 The administrative record shows that the BLM, at the most, simply
periodically checks to ensure than the long-term holding
27 contractors are complying with the terms of their housing
agreements. See, e.g., AR 28575, 28842, 29233., Plaintiffs'
28 suggestion that this responsible oversight on the BLM's part
transforms private land into public land is without merit.

1 **B. NEPA Violations**

2
3 In addition to arguing that the proposed gather violates the
4 Wild Horses Act, Plaintiff also claims that the gather's
5 underlying EA runs counter to the provisions of NEPA, since it
6 failed to take the requisite "hard look" at the environmental
7 impact of the action. See Kleppe v. Sierra Club, 427 U.S. 390,
8 410 n.21 (1976). Not every action, however, requires a
9 comprehensive EIS, however; rather, if the agency concludes that
10 there will be no significant environmental impact on the basis of
11 a less detailed EA, it can issue a Finding of No Significant
12 Impact, as the BLM did here on the basis of the 158-page EA that
13 was prepared. The Court's review of the EA under NEPA should be
14 limited to whether the BLM took a hard look at the environmental
15 consequences of the gather; it must not substitute its own
16 judgment for that of the agency. See Okanogan Highlands
17 Alliance v. Williams, 236 F.3d 468, 473 (9th Cir. 2000) (citing
18 Kleppe, supra).

19 Despite the BLM's preparation of a lengthy EIS in this
20 matter, Plaintiffs argue that it was still error to have not
21 prepared a full EIS given the 2010 Twin Peak Gather's combination
22 of both a significant roundup (some 80 to 90 percent of the herd)
23 and the additional herd manipulations that were approved,
24 including the immunocontraceptive use and sex skewing designed to
25 curb further population growth. According to Plaintiffs, this
26 combination creates a dangerous "precedent" for additional wide-
27 ranging roundups that made preparation of an EIS even more
28 imperative.

1 Plaintiffs' argument in this regards ignores the fact that EAs
2 are "usually highly specific to the project and the locale, thus
3 creating no binding precedent." Barnes v. U.S. Dept. Of Transp.,
4 655 F.3d 1124, 1140 (9th Cir. 2011), citing Town of Cave Creek v.
5 FAA, 325 F.3d 320, 332 (D.C. Cir. 2003). This Court accordingly
6 rejects Plaintiffs' argument that the scope of the project in
7 itself required a full EIS.

8 Plaintiffs go on to claim that the EA failed to consider
9 sufficient alternatives to its proposed gather plan. A review as
10 to the adequacy of such alternatives, however, is governed by a
11 "rule of reason" commensurate with the EA's statement of purpose
12 and need. See City of Carmel-By-The-Sea v. U.S. Dep't of
13 Transp., 123 F.3d 1142, 1156 (9th Cir. 1997). As set forth
14 above, given the rapidly increasing horse and wild burro
15 population and the BLM's obligation to consider other range users
16 in addition to the horses and burros, it appears clear that given
17 the established ALM range for the animals, wild horses and burros
18 exceeded recommended levels by between three and five times. The
19 EA indicates that the agency thoroughly examined the direct,
20 indirect, and cumulative impacts of the proposed gather, of
21 taking no action, and of two alternative actions. AR 15520-15550
22 (impacts), AR 15456-15462 (alternatives). While the agency did
23 eliminate from serious consideration another fourteen options (as
24 suggested by the public) that did nothing to decrease horse and
25 burro population, since that corresponded neither with their
26 objective or the statutory mandate that excess animals be removed
27 (AR 15462-15468) it did look seriously at the above-described
28 four different alternatives before settling on the proposed action.

1 Plaintiffs' reliance on a NEPA alternatives claim to attack the
2 EA is misplaced under these circumstances.

3 Plaintiffs argue that the BLM should have considered
4 alternatives short of its decision to relocate a large part of
5 the Twin Peaks herd, and allege that BLM's decision to limit
6 consideration of other potential measures was "arbitrarily
7 narrow." As the government points out, Plaintiff's suggestion
8 that the BLM should have reduced livestock grazing levels and
9 fenced off sensitive riparian sites and springs simply does not
10 address the Act's requirement that overpopulation be kept in
11 check. The EA explained, for example, how reduced livestock
12 grazing would have done nothing to decrease the rapidly
13 burgeoning wild horse and burro population. AR 15462-63. Nor
14 was Plaintiffs' suggestion that excess population be controlled
15 through natural predators like mountain lions any more realistic.
16 The EA noted that, based on decades of monitoring, the number of
17 instances where lions have killed horses is "extremely low" and
18 "cannot be considered a viable factor in population control."
19 AR 15471.

20 The alternatives advanced by Plaintiffs were inadequate
21 because they did not reduce population and therefore accomplish
22 BLM's objective and the requirements of the Act. NEPA does not
23 compel an agency to consider alternatives that would not fulfill
24 the objectives of a proposed project. See, e.g., Laguna
25 Greenbelt, Inc., v. U.S. Dep't of Transp., 42 F.3d 517, 524
26 (9th Cir. 1994) (agencies need not "consider alternatives which
27 are infeasible, ineffective, or inconsistent with the basic
28 policy objectives for the management of the area").

1 Under the so-called "rule of reason" articulated by the Ninth
2 Circuit in its City of Carmel case, then, the BLM analyzed an
3 adequate range of alternatives in the EA it prepared in advance
4 of the 2010 Twin Peaks Gather.

5 Plaintiffs also claim that the subject EA is lacking
6 scientifically and fails to adequately respond to dissenting
7 scientific opinion. Examination of the lengthy EA, however,
8 indicates that all aspects of the proposed gather were carefully
9 considered. While Plaintiffs take particular aim at the plan to
10 skew the sex ratio of released animals to 60 percent male, and
11 inject some mares with immunocontraceptives, those actions will
12 not apply to animals not gathered (typically a capture rate of
13 only about 80 percent is achieved). Moreover, the EA explains in
14 detail why those measures were necessary to help curb further
15 population increase. The EA determined, for example, that the
16 PZP contraception is completely reversible, meets BLM
17 requirements for safety to mares and to the environment, and can
18 be easily administered in the field. AR 15530. It also
19 disclosed the impacts of the PZP contraceptive vaccine. Id. at
20 Id. at 15529-30. At least one district court has found that the
21 PZP contraceptives in question are not so uncertain as to require
22 an EIS. Cloud Foundation v. Kempthorne, 2008 WL 2794741 at *9
23 (D. Mont. 2008).

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1 According to the previously submitted Declaration of Albert J.
2 Kane, a Senior Staff Veterinarian for the United States
3 Department of Agriculture who also serves as an adviser to the
4 BLM's Wild Horse and Burro program on matters related to animal
5 care, PZP treatments have been administered to free roaming wild
6 horses since the 1990's, and since 2004, the BLM has safely
7 administered over 2,700 doses of the vaccine in over 75 herd
8 management areas, with no evidence of the treatment having any
9 effect on population ecology. Kane Decl., ¶ 28, ECF No. 31, as
10 cited in Gov't's Opening Papers, ECF No. 111, 30:13-16.

11 Although Plaintiffs appear to contend that the BLM failed to
12 adequately respond to scientific studies that show the
13 contraceptives to be more effective during their limited (up to
14 two year) period of efficacy (the BLM's scientists estimated up
15 to 80 perfect effectiveness, whereas Plaintiffs point to studies
16 suggesting that the effectiveness might be closer to 100
17 percent), the fact that the BLM chose to stand by its own
18 estimates after acknowledging the information provided by
19 Plaintiffs does not make the EA insufficient. An agency has the
20 discretion to rely on the reasonable opinion of its own experts
21 (Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989)),
22 and agencies are accorded particular deference with respect to
23 scientific issues within their area of expertise. See Sw. Ctr.
24 for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515,
25 523 (9th Cir. 1998). Because the EA has given a thorough and
26 reasoned explanation for its determinations, the expert analyses
27 contained therein are entitled to substantial weight.

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1 See, e.g., Native Ecosystems Council v. U.S. Forest Serv.,
2 428 F.3d 1233, 1244 (9th Cir. 2005).

3 The BLM may nonetheless be vulnerable given the fact that
4 certain scientific studies (Cooper and Larsen (2006) and Nunez
5 et al. (2009)) questioned the long-term effects of PZP on herd
6 behavior, particularly when repeatedly administered. Chad Hanson
7 emphasized those studies in his own report, which the BLM largely
8 dismissed. The studies upon which Hanson relies, however, appear
9 to largely be concerned about "possible" effects, and therefore
10 can be distinguished on that basis since effects that are only
11 "possible" do not represent true "dissenting" views. Moreover,
12 the vaccine to be administered in the course of the 2010 Twin
13 Peaks Gather was a single, first time dose as opposed to the
14 Cooper and Larson and Nunez studies which assessed the effects on
15 horses of repeated doses of PZP. The studies, and Hanson's
16 reliance on them, can be distinguished from the present case on
17 that ground as well.

18 Plaintiffs also claim that the scientific integrity of the
19 EA was compromised, and violated NEPA, because the BLM failed to
20 make available hard data (in the form of so-called Riparian
21 Functional Assessments, or "RFAs") it used to conclude that some
22 riparian/spring sites were damaged and in a state of decline due
23 to damage caused primarily by wild horses and burros. Plaintiffs
24 further contend that methodology used for aerial population
25 inventories was not disclosed, also in contravention of NEPA's
26 requirement that a reasoned analysis occur based on the evidence
27 being made "available to all concerned." Friends of Endangered
28 Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985).

1 Plaintiffs claim the allegedly withheld evidence undermined the
2 "informed decision making" that results from hard data being
3 provided for scrutiny by all concerned. Pls.' Reply, 46:20-25.

4 The EA contains an extensive discussion on the effects of
5 wild horses and burros on riparian and wetland sites and explains
6 how the BLM determined that certain of those impacts were
7 attributable to wild horses and burros rather than livestock.
8 AR 15494-15502. The RFAs were expressly referred to in the body
9 of the EA, and the results of the assessments were duly
10 summarized.

11 As the government notes, NEPA's implementing regulations
12 encourage agencies to incorporate material by reference,
13 particularly in an EIS. See 40 C.F.R. § 1500.4(j); § 1502.21
14 ("Agencies shall incorporate material into an [EIS] by reference
15 when the effect will be to cut down on bulk without impeding
16 agency and public review of the action").

17 With respect to the BLM's methodology for obtaining
18 population inventories of the animals, Plaintiffs' argument that
19 the EA failed to provide adequate information also fails. First,
20 the EA describes the population data in adequate detail and
21 explains that the aerial inventory was done by direct counting.
22 AR 15472-74. In addition, there is no evidence suggesting that
23 the population data obtained through direct counting was
24 inaccurate in any event.

25 Finally, it must also be emphasized that in an EA, an agency
26 is not required to include the same level of detail, and the same
27 depth of response, as for a full EIS. See Cal. Trout v. FERC,
28 572 F.3d 1003, 1016 (9th Cir. 2009).

1 Under 40 C.F.R. 1508.9, an EA is defined as a "concise public
2 document.... that serves to [b]riefly provide sufficient evidence
3 and analysis for determining whether to prepare an environmental
4 impact statement of a finding of no significant impact." An
5 agency must go farther and prepare a full EIS only "if
6 substantial questions are raised as to whether a project may
7 cause significant degradation of some human environmental factor.
8 LaFlamme v. FERC, 852 F.2d 389, 397 (9th Cir. 1988). Here,
9 following careful consideration of the impacts of the proposed
10 action within a lengthy, 158-page EA, the BLM determined that an
11 EIS was not necessary inasmuch as the requisite "significant
12 impact" needed to trigger preparation of a full EIS was lacking.
13 That conclusion appears well-reasoned and entitled to deference
14 by this Court.

15
16 **CONCLUSION**
17

18 Having failed to meet the high standard necessary to
19 demonstrate that the BLM's actions, both in preparing the EA for
20 the 2010 Twin Peaks Gather and in conducting the gather, were
21 arbitrary and capricious either with respect to the Wild Free-
22 Roaming Horse and Burro Act or the National Environmental Policy
23 Act, Plaintiffs' Motion for Summary Judgment (ECF No. 104) is
24 denied. Summary Judgment is therefore granted with respect to
25 the cross-motions filed by the government (ECF No. 111) and
26 Defendant-Intervenor Safari Club (ECF No. 109).

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1 The Clerk of Court is directed to enter judgment accordingly and
2 to close this file.

3 IT IS SO ORDERED.

4 Dated: November 15, 2012

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7 MORRISON C. ENGLAND, JR.
8 UNITED STATES DISTRICT JUDGE
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